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DECISION

OF

JUDGE LEAVITT, OF OHIO,

IN THE

VALLANDIGHAM

Habeas Corpus Case.

U. S. Circuit Court for the District of Ohio



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DECISION OF JUDGE LEAVITT

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VALLANDIGHAM HABEAS CORPUS CASE.

AT ten o'clock, on the morning of May 16, 1863, the Circuit Court room was crowded to hear the decision of Judge Leavitt in the application of C. L. Vallandigham for a writ of *habeas corpus*. The following is the decision of the court:

EX PARTE—C. L. VALLANDIGHAM—HABEAS CORPUS.

This case is before the court on the petition of Clement L. Vallandigham, a citizen of Ohio, alleging that he was unlawfully arrested at his home in Dayton, in this State, on the night of the 5th of May inst., by a detachment of soldiers of the army of the United States, acting under the orders of Ambrose E. Burnside, a Major-General in the army of the United States, and brought, against his will, to the city of Cincinnati, where he has been subjected to a trial before a Military Commission, and is still detained in custody and restrained of his liberty. The petitioner also avers that he is not in the land or naval service of the United States, and has not been called into active service in the militia of any State; and that his arrest, detention and trial, as set forth in his petition, are illegal, and in violation of the Constitution of the United States. The prayer is, that a writ of *habeas corpus* may issue requiring General Burnside to produce the body of the petitioner before this court, with the cause of his caption and detention. Accompanying the petition is a statement of the charges or specifications on which he alleges he was tried

before the Military Commission. For the purposes of this decision, it is not necessary to notice these charges specially, but it may be stated in brief that they impute to the petitioner the utterance of sundry disloyal opinions and statements, in a public speech at the town of Mt. Vernon, in the State of Ohio, on the 1st of May inst., with the knowledge "that they did aid and comfort and encourage those in arms against the Government, and could but induce in his hearers a distrust in their own Government and a sympathy for those in arms against it, and a disposition to resist the laws of the land." The petitioner does not state what the judgment of the Military Commission is, nor is the court informed whether he has been condemned or acquitted on the charges exhibited against him.

It is proper to remark here, that on the presentation of the petition the court stated to the counsel for Mr. Vallandigham that, according to the usages of the court, as well as of other courts of high authority, the writ was not grantable of course, and would only be allowed on a sufficient showing that it ought to issue. The court is entirely satisfied of the correctness of the course thus indicated. The subject was fully examined by the learned Justice Swayne, when present, the presiding judge of this court, on a petition for a *habeas corpus*, presented at the last October term; a case to which further reference will be presently made. I shall now only note the authorities on this point, which seem to be entirely conclusive. Peters, 201, Cushing, R. 285; Hurd on *Habeas Corpus*, 222-23-24. In pursuance of this ruling, an order was made by the court that notice be given to General Burnside, of the pendency in the court of the application for the writ, to the end that he might appear by counsel or otherwise to oppose the granting of the writ. That distinguished General has accordingly presented a respectful communication to the court, stating generally and argumentatively the reasons of the arrest of Mr. Vallandigham, and has also authorized able counsel to represent him in resistance of the application for the writ. And the case has been argued at great length, and with great ability on the motion for its allowance.

It is proper to remark further, that when the petition was presented, the court made a distinct reference to the decision of this court in the case of Bethuel Rupert, at October term, 1862, before noticed, as an authoritative precedent for its action on this application. On full reflection, I do not see how it is possible for me, sitting alone in the Circuit Court, to ignore the decision, made upon full consideration by Justice Swayne, with the concurrence of myself, and which, as referable to all cases involving the same principle, must be regarded as the law of this court until reversed by a higher court. The case of Rupert was substantially the same as that of the present petitioner. He set out in his petition what he alleged to be an unlawful arrest by the order of a military officer, on a charge imputing to him acts of disloyalty to the Government, and sympathy with the rebellion against it, and an unlawful detention and imprisonment as the result of such order. The application, however, in the case of Rupert, differed from the one now before the court, in this, that affidavits were exhibited intended to disprove the charge of disloyal conduct imputed to him; and also in this, that there was no pretence or showing by Rupert that there had been any investigation or trial by any court of the charges against him.

The petition in this case is addressed to the Judges of the Circuit Court, and not to a single Judge of that court. It occurs from the absence of Mr. Justice Swayne that the District Judge is now holding the Circuit Court, as he is authorized to do by law. But thus sitting, would it not be in violation of all settled rules of judicial practice, as well as of courtesy, for the District Judge to reverse a decision of the Circuit Court, made when both judges were on the bench? It is well known that the District Judge, though authorized to sit with the Circuit Judge in the Circuit Court, does not occupy the same official position, and that the latter judge, when present, is, *ex officio*, the Presiding Judge. It is obvious that confusion and uncertainty, greatly impairing the respect due to the adjudications of the Circuit Courts of the United States, would result from the assumption of such an exercise of power by the

District Judge. It would not only be disrespectful to the Superior Judge, but would evince in the District Judge, an utter want of appreciation of his true official connection with the Circuit Court.

Now, in passing upon the application of Rupert, Mr. Justice Swayne in an opinion of some length, though not written, distinctly held, that this court would not grant the writ of *habeas corpus*, when it appeared that the detention or imprisonment was under military authority. It is true, that Rupert was a man in humble position—unknown beyond the narrow circle in which he moved; while the present petitioner has a widespread fame as a prominent politician and statesman. But no one will insist that there should be any difference in the principles applicable to the two cases. If any distinction were allowable, it would be against him of admitted intelligence and distinguished talents.

I might with entire confidence place the grounds of action I propose in the present case, upon the decision of the learned judge in that just referred to. Even if I entertained doubts of the soundness of his views, I see no principle on which I could be justified in treating the opinion as void of authority. But the counsel of Mr. Vallandigham was not restricted in the argument of this motion to this point. It seemed due to him that the court should hear what could be urged against the legality of the arrest, and in favor of the interposition of the court in behalf of the petitioner. And I have been greatly interested in the forcible argument which has been submitted, though unable to concur with the speaker in all his conclusions.

If it were my desire to do so, I have not now the physical strength to notice or discuss at length the grounds on which the learned counsel has attempted to prove the illegality of General Burnside's order for the arrest of Mr. Vallandigham, and the duty of the court to grant the writ applied for. The basis of the whole argument is the fact that Mr. Vallandigham, not being in the military or naval service of the Government, and not therefore subject to the rules and articles of

war, was not liable to arrest under or by military power. And the various provisions of the Constitution, intended to guard the citizen against unlawful arrests and imprisonments, have been cited and urged upon the attention of the court as having a direct bearing on the point. It is hardly necessary to quote these excellent guarantees of the rights and liberties of an American citizen, as they are familiar to every reader of the Constitution. And it may be conceded that if, by a just construction of the constitutional powers of the Government, in the solemn emergency now existing, they are applicable to, and must control, the question of the legality of the arrest of the petitioner, it cannot be sustained for the obvious reason that no warrant was issued "upon probable cause, supported by oath or affirmation," as is required in ordinary arrests for alleged crimes. But are there not other considerations of a controlling character applicable to the question? Is not the court imperatively bound to regard the present state of the country, and, in the light which it throws upon the subject, to decide upon the expediency of interfering with the exercise of the military power as invoked in the pending application? The court cannot shut its eyes to the grave fact that war exists, involving the most imminent public danger, and threatening the subversion and destruction of the Constitution itself. In my judgment, when the life of the Republic is imperiled, he mistakes his duty and obligation as a patriot, who is not willing to concede to the Constitution such a capacity of adaptation to circumstances as may be necessary to meet a great emergency, and save the nation from hopeless ruin. Self-preservation is a paramount law, which a nation, as well as an individual, may find it necessary to invoke. Nothing is hazarded in saying, that the great and far seeing men who framed the Constitution of the United States, supposed they were laying the foundations of our National Government on an immovable basis. They did not contemplate the existence of the state of things with which the nation is now unhappily confronted; the heavy pressure of which is felt by every true patriot. They did not recognize the right of Secession by one or more States,

for the obvious reason that it would have been an incorporation of an element in the Constitution for the destruction of the Union. In their glowing visions of futurity, there was no foreshadowing of a period, when the people of a large geographical section would be guilty of the madness and the crime of arraying themselves in rebellion against a government, under whose mild and benignant sway there was so much of hope and promise for the coming ages. We need not be surprised, therefore, that, in the organic law which they gave us, they made no specific provision for such a lamentable occurrence. They did, however, distinctly contemplate the possibility of foreign war, and vested in Congress the power to declare its existence, and "to raise and support armies" and "provide and maintain a navy." They were aware that the grant of these powers implied all other powers necessary to give them full effect. They also declared that the President of the United States "shall be Commander-in-Chief of the Army and Navy, and of the Militia of the several States when called into actual service," and they placed upon him the solemn obligation "to take care that the laws be faithfully executed." Under this last named provision, and in reference to a local rebellion, in which the laws of the Union were obstructed, the act of the 28th of February, 1795, was passed, providing, in substance, that whenever in any State the civil authorities of the Union were unable to enforce the laws, the President shall be empowered to call out such military force as might be necessary for the emergency. Fortunately for the country, this law was in force when several States of the Union repudiated their allegiance to the National Government, and placed themselves in armed rebellion against it. It was sufficiently comprehensive in its terms to meet such an occurrence, although it was not a case within the contemplation of Congress when the law was enacted. It was under this statute that the President issued his Proclamation of the 15th of April, 1861. From that time the country has been in a state of war, the history and progress of which are familiar to all. More than two years have elapsed, during which the treasure

of the nation has been lavishly contributed and blood has freely flowed, and this formidable rebellion is not yet subdued. The energies of the loyal people of the Union are to be put to further trials, and in all probability the enemy is yet to be encountered on many a bloody field.

It is not to be disguised that our country is in imminent peril, and that the crisis demands of every American citizen a hearty support of all proper means for the restoration of the Union and the return of an honorable peace. Those placed by the people at the head of the Government are earnestly and sincerely devoted to its preservation and perpetuity. The President may not be the man of our choice, and the measures of his Administration may not be such as all can fully approve. But these are minor considerations, and can absolve no man from the paramount obligation of lending his aid for the salvation of his country. All should feel that no evil they can be called on to endure as the result of war is comparable with the subversion of our chosen Government, and the horrors which must follow from such a catastrophe.

I have referred thus briefly to the present crisis of the country as having some bearing on the question before the court. It is clearly not a time when any one connected with the Judicial Department of the Government should allow himself, except from the most stringent obligations of duty, to embarrass or thwart the Executive in his efforts to deliver the country from the dangers which press so heavily upon it. Now, the question which I am called upon to decide is, whether General Burnside, as an agent of the Executive Department of the Government, has transgressed his authority in ordering the arrest of Mr. Vallandigham. If the theory of his counsel is sustainable, that there can be no legal arrest except by warrant based on an affidavit of probable cause, the conclusion would be clear, that the arrest was illegal. But I do not think I am bound to regard the inquiry as occupying this narrow base. General Burnside, by the order of the President, has been designated and appointed to take the military supervision of the Department of the Ohio, composed of the States of Ken-

tucky, Ohio, Indiana, Illinois and Michigan. The precise extent of his authority in this responsible position are not known to the court. It may, however, be properly assumed as a fair presumption, that the President has clothed him with all the powers necessary to the efficient discharge of his duties in the station to which he has been called. He is the representative and agent of the President, within the limits of his Department. In time of war the President is not above the Constitution, but derives his power expressly from the provision of that instrument, declaring that he shall be Commander-in-Chief of the Army and Navy. The Constitution does not specify the powers he may rightfully exercise in this character, nor are they defined by legislation. No one denies, however, that the President, in this character, is invested with very high powers, which, it is well known, have been exercised on various occasions during the present rebellion. A memorable instance of its exercise is seen in the Emancipation Proclamation issued by the President as Commander-in-Chief, and which he justifies as a military necessity. It is, perhaps, not easy to define what acts are properly within this designation, but they must undoubtedly be limited to such as are deemed essential to the protection and preservation of the Government and the Constitution, which the President has sworn to support and defend. And in deciding what he may rightfully do under this power, where there is no express legislative declaration, the President is guided solely by his own judgment and discretion, and is only amenable for an abuse of his authority by impeachment, prosecuted according to the requirement of the Constitution. The occasion which calls for the exercise of this power exists only from the necessity of the case; and when the necessity exists, there is a clear justification of the act.

If this view of the power of the President is correct, it undoubtedly implies the right to arrest persons, who, by their mischievous acts of disloyalty, impede or endanger the military operations of the Government. And, if the necessity exists, I see no reason why the power does not attach to the officer or general in command of a military department. The only

reason why the appointment is made, is that the President cannot discharge the duties in person. He, therefore, constitutes an agent to represent him, clothed with the necessary power for the efficient supervision of the military interests of the Government throughout the department. And it is not necessary that martial law should be proclaimed or exist, to enable the general in command to perform the duties assigned to him. Martial law is well defined by an able jurist to be "the will of a military commander operating without any restraint, save his judgment, upon the lives, upon the persons, upon the entire social and individual condition of all over whom this law extends." It cannot be claimed that this law was in operation in General Burnside's department, when Mr. Vallandigham was arrested.

Nor is it necessary that it should have been in force to justify the arrest. The power vested by virtue of the authority was conferred by the appointment of the President. Under that appointment General Burnside assumed the command of this department. That he was a man eminently fitted for the position there is no room for a doubt. He had achieved during his brief military career a national reputation as a wise, discreet, patriotic and brave general. He not only enjoyed the confidence and respect of the President and Secretary of War, but of the whole country. He had nobly laid his party preferences and predilections upon the altar of his country, and consecrated his life to her service. It was known that the widely-extended department, with the military supervision of which he was charged, was one of great importance, and demanded great vigilance and ability in the administration of its military concerns. Kentucky was a border State, in which there was a large element of disaffection toward the National Government, and sympathy with those in rebellion against it. Formidable invasions have been attempted, and are now threatened. Four of the States have a river border, and are in perpetual danger of invasion. In Ohio, Indiana and Illinois a class of mischievous politicians had succeeded in poisoning the minds of a portion of the community with the rankest feelings of dis-

loyalty. Artful politicians, disguising their latent treason under hollow pretensions of devotion to the Union, were striving to disseminate their pestilent heresies among the masses of the people. The evil was one of alarming magnitude, and threatened seriously to impede the military operations of the Government, and greatly to protract the suppression of the rebellion. General Burnside was not slow to perceive the dangerous consequences of these disloyal efforts, and resolved, if possible, to suppress them. In the exercise of his discretion, he issued the order—No. 38—which has been brought to the notice of the court. I shall not comment on that order, or say anything more in vindication of its expediency. I refer to it only because General Burnside, in his manly and patriotic communication to the court, has stated fully his motives and reasons for issuing it, and also that it was for its supposed violation that he ordered the arrest of Mr. Vallandigham. He has done this under his responsibility as the Commanding General of this department, and in accordance with what he supposed to be the power vested in him by the appointment of the President. It was virtually the act of the Executive Department under the power vested in the President by the Constitution; and I am unable to perceive on what principle this judicial tribunal can be invoked to annul or reverse it. In the judgment of the Commanding General, the emergency required it, and whether he acted wisely or discreetly is not properly subject for judicial review.

It is worthy of remark here, that this arrest was not made by General Burnside under any claim or pretension that he had authority to dispose of or punish the party arrested, according to his own will, without trial and proof of the facts alleged as the ground for the arrest, but with a view to an investigation by a military court or commission. Such an investigation has taken place, the result of which has not been made known to this court. Whether the Military Commission for the trial of the charges against Mr. Vallandigham was legally constituted and had jurisdiction of the case, is not a question before this court. There is clearly no authority in

this court, on the pending motion, to revise or reverse the proceedings of the Military Commission, if they were before the court. The sole question is, whether the arrest was legal; and as before remarked, its legality depends on the necessity which existed for making it; and of that necessity, for the reason stated, this court cannot judicially determine. General Burnside is unquestionably amenable to the Executive Department for his conduct. If he has acted arbitrarily and upon insufficient reasons, it is within the power, and would be the duty, of the President, not only to annul his acts, but to visit him with decisive marks of his disapprobation. To the President, in his capacity of Commander-in-Chief of the Army, he must answer for his official conduct. But under our Constitution, which studiously seeks to keep the executive, legislative and judicial departments of the Government from all interference and conflict with each other, it would be an unwarrantable exercise of the judicial power to decide that a co-ordinate branch of the Government, acting under its high responsibilities, had violated the Constitution, in its letter or its spirit, by authorizing the arrest in question. Especially in these troublous times, when the national life is in peril, and when union and harmony among the different branches of the Government are so imperatively demanded, such interference would find no excuse or vindication. If the doctrine is to obtain, that every one charged with and guilty of acts of mischievous disloyalty, not within the scope of the criminal laws of the land, in custody under military authority, is to be set free by courts or judges on *habeas corpus*, it requires no argument to prove that the most alarming conflicts must follow, and the power of the Government be most seriously impaired. I dare not, in my judicial position, assume the fearful responsibility implied in the sanction of such a doctrine.

And here, without subjecting myself to the charge of trenching upon the domain of political discussion, I may be indulged in the remark that there is too much of the pestilential leaven of disloyalty in the community. There is a class of men in the loyal States who seem to have no just appreciation of the

deep criminality of those who are in arms avowedly for the overthrow of the Government, and the establishment of a Southern Confederacy. They have not, I fear, risen to any right estimate of their duties and obligations, as American citizens, to a Government which has strewn its blessings with a profuse hand. I may venture the assertion that the page of history will be searched in vain for an example of a rebellion so wholly destitute of excuse or vindication, and so dark with crime, as that which our bleeding country is now called upon to confront, and for the suppression of which all her energies are demanded. Its cause is to be found in the unhallowed ambition of political aspirants and agitators, who boldly avow their aim, not the establishment of a Government for the better security of human rights, but one in which all political power is to be concentrated in an odious and despotic oligarchy. It is indeed consolatory to know that in most sections of the North, those who sympathize with the rebellion, are not so numerous and formidable, as the apprehensions of some would seem to indicate. It may be assumed, I trust, that in most of the Northern States, reliable and unswerving patriotism is the rule, and disloyalty and treason the exception. But there should be no division of sentiment upon this momentous question. Men should know, and lay the truth to their heart, that there is a course of conduct not involving overt treason, and not therefore subject to punishment as such, which nevertheless implies moral guilt and a gross offense against their country. Those who live under the protection and enjoy the blessings of our benignant Government, must learn that they cannot stab its vitals with impunity. If they cherish hatred and hostility to it, and desire its subversion, let them withdraw from its jurisdiction, and seek the fellowship and protection of those with whom they are in sympathy. If they remain *with* us, while they are not *of* us, they must be subject to such a course of dealing as the great law of self-preservation prescribes and will enforce. And let them not complain, if the stringent doctrine of military necessity should find them to be the legitimate subject of its action. I have no fears that the recognition

of this doctrine will lead to an arbitrary invasion of the personal security, or personal liberty of the citizen. It is rare indeed that a charge of disloyalty will be made upon insufficient grounds. But if there should be an occasional mistake, such an occurrence is not to be put in competition with the preservations of the life of the nation. And I confess, I am but little moved by the eloquent appeals of those who, while they indignantly denounce violations of personal liberty, look with no horror upon a despotism as unmitigated as the world has ever witnessed.

But I can not pursue this subject further. I am aware there are points made by the learned counsel representing Mr. Vallandigham, to which I have not adverted. I have had neither time nor strength for a more elaborate consideration of the questions involved in this application. For the reasons which I have not attempted to set forth, I am led clearly to the conclusion that I cannot judicially pronounce the order of General Burnside for the arrest of Mr. Vallandigham as a nullity, and must, therefore, hold that no sufficient ground has been exhibited for granting the writ applied for. And I may properly add here, that I am fortified in my conclusion by the fact just brought to my notice, that the Legislature of Ohio, at its late session, has passed two statutes, in which the validity and legality of arrests in this State under military authority are distinctly sanctioned. This is a clear indication of the opinion of that body, that the rights and liberties of the people are not put in jeopardy by the exercise of the power in question, and is, moreover, a concession that the present state of the country requires and justifies its exercise. It is a clear intimation that the people of our patriotic State will sanction such a construction of the Constitution as, without a clear violation of its letter, will adapt it to the existing emergency.

There is one other consideration to which I may, perhaps, properly refer, not as a reason for refusing the writ applied for, but for the purpose of saying that, if granted, there is no probability that it would be available in relieving Mr. Vallandigham from his present position. It is, at least, morally certain

it would not be obeyed. And I confess I am somewhat reluctant to authorize a process, knowing it would not be respected, and that the Court is powerless to enforce obedience. Yet, if satisfied there were sufficient grounds for the allowance of the writ, the consideration to which I have adverted would not be conclusive against it.

Mr. Pugh then drew up an entry, to be made upon the records, which Judge Leavitt accepted, and ordered to be spread upon the minutes. The Court then adjourned.







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